

Bad Response to a Tragic Choice: the Case of Polish Council of the Judiciary

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A few days ago, the courageous and intelligent Chief Justice of the Polish Supreme Court, Professor Małgorzata Gersdorf, announced that, after some agonizing due to important legal and moral dilemmas at stake, she decided after all to convene the first, inaugural meeting of the National Council of Judiciary (Polish acronym which will be used here: KRS). The meeting is to take place on 27 April.

The decision was met with dismay on the part of some lawyers (including myself), and relief on the part of others (those related to or supporting the Law and Justice ruling party, or PiS). Generally, however, it did not prompt any particularly strong responses on either side. But the decision is momentous, both in its practical consequences and as a matter of principle. To understand why, one has to get acquainted with the background of Gersdorf's decision, namely, with the substance and the process of setting up a new KRS.

The statute on KRS was one of three laws on courts enacted by PiS in the middle of 2017, and one of the two laws (alongside the statute on the Supreme Court) vetoed initially by President Andrzej Duda. KRS is a constitutionally designated body with the key role in all judicial nominations: it has the power to nominate all the candidates for judicial position in the nation, and propose them to the President of the Republic. (It is a matter of some controversy under the constitutional law whether the President may reject the KRS nominations but I will not be going into this here). Its most general constitutional mission is to safeguard the independence of courts and judges. Among a number of its additional powers perhaps the most important is to lodge motions to the Constitutional Tribunal regarding the constitutionality of normative acts on courts and judges; it also adopts a code of ethics governing the judicial profession, expresses an opinion on drafts of normative acts concerning the judiciary, etc.

Judges elected by politicians

PiS from the very beginning of its campaign against the judiciary considered the judicial component of the KRS to be the main obstacle to its reform. According to the Constitution the KRS consists of 15 *judges*; the remaining members are: Chief Justices of the SC and Supreme Administrative Court, Minister of Justice, a representative of the President, 4 MPs elected by the Sejm and 2 senators elected by the Senate. The Constitution does not provide explicitly that the judges on KRS are elected by the judiciary: it only says that 15 members are "chosen from amongst the judges" (Art 187) but so far it has always been understood that they are elected by the judiciary itself, and accordingly the old statute on KRS established a complex mode of elections within different branches and types of the judiciary. Importantly, the "new" Constitutional Tribunal's judgment of 20 June 2017 (in which some improperly elected "judges" participated) which found the statute unconstitutional did not object to the very principle that the judges are elected by their peers

but only objected to different methods of those inter-judiciary elections at different levels of courts.

The principle that the judicial component of the KRS is a representative of the judiciary and therefore must be elected by judges has not been challenged until now. As the Consultative Council of European Judges (CCJE), a body affiliated with Council of Europe, said in its recent Report, “the Committee of Ministers of the Council of Europe took the position that not less than half the members of Councils for the Judiciary should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary”.¹⁾ The Opinion of the CCJE Bureau of 12 October 2017 on the draft legislation on the Polish National Council of the Judiciary presented by the President of Poland (CCJE-BU(2017)9Rev), para 14, p. 4, (last accessed 16 January 2018). See also the OSCE Office for Democratic Institutions and Human Rights final opinion on draft amendments to the act on the national council of the judiciary and certain other acts of Poland, No JUD-POL/305/2017-Final, Warsaw, 5 May 2017, (last accessed 16 January 2016). The same was emphasized by the Venice Commission which has adopted the view that “a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself”.²⁾ Report of the Judicial Appointments and the Report on the Independence of the Judicial System, quoted in the opinion on the draft act amending the act on the national council of the judiciary, on the draft act amending the act on the Supreme Court, proposed by the president of Poland, and on the act on the organisation of ordinary courts No. 904/2017, adopted by the Venice Commission at its 113th Plenary Session (8-9 December 2017), para 17, p. 6, (last accessed 16 January 2016). In addition to the principled argument for maintaining the established and uncontested constitutional custom of letting the judges elect the judicial component of the KRS, there was also an important textual argument. With regard to MPs sitting on the KRS, the Constitution explicitly provides that they are “elected by the Sejm” (and, similarly, with regard to the Senators that they are “elected by the Senate”), so if the constitution makers wanted to allow or mandate the election of judges-members of the KRS also by the Sejm, they would have said it openly, as they did regarding the representatives of both chambers of Polish parliament.

The principle of representatives of judges to be elected by their peers for the first time has been challenged and rejected by PiS in its bill on KRS, and also by President Duda in his own bill proposed after his veto to the PiS bill. Both PiS and Duda wanted the 15 judges on KRS to be elected by the legislature rather than by judges themselves as is currently the case. The only disagreement was about the majority needed for their election: PiS proposed a simple majority; Duda, a 3/5 majority, on the basis of the argument that it would let the opposition have some influence upon the composition of the KRS. In the end, the law voted on by Sejm on 8 December 2017 and the Senate on 15 December 2017, and signed by the President on 20 December 2017, envisages that the 15 judges in KRS will be elected by the Sejm. The candidates may be proposed by groups of citizens (minimum 2000) or groups of 25 judges; the Sejm is to elect the KRS members by a 3/5 majority but if this mode does not result in a full list of 15, the remaining members will be elected by a simple majority. This gives the ruling party a decisive say in the composition of the KRS, and indirectly, in the nominations of judges; in effect, it is a return to the proposals initially vetoed by the President. A remark by the Venice Commission, addressed to an earlier draft, applies well to the law eventually adopted: the mechanism of assuring compromise in

the vote for members “would not be effective if in the second round candidates supported only by the ruling party may be elected by a simple majority of votes”.³⁾Opinion 904/2017 para 22.

Only 18 candidates

The law also envisages a pre-term removal of all the judges currently sitting as members of the Council despite a constitutionally guaranteed term of office (of 4 years). The unconstitutional extinguishment of the constitutional term of office was never even mentioned by President Duda when he vetoed the initial bill, and this arrangement has been maintained in the statute. The Venice Commission’s opinion stated the obvious: a combination of a new, parliamentary method of election of judges in KRS with the termination of terms of office of all currently serving members “is going to weaken the independence of the Council with regard to the majority in Parliament”.⁴⁾Opinion 904/2017 para 31. See also the European Commission recommendation of 20 December 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, Brussels, 20 December 2017, C(2017) 9050 final. In fact, it is an understatement. In conjunction with the new act on the SC and on ordinary courts it amounts to the full capture of the judiciary by the ruling party.

The law on KRS caused a great deal of controversy within the judicial profession, especially with regard to the judicial candidates to the Council, with an ensuing polarization between a large majority of judges critical of the “reforms” and a minority loyal to the authorities. As the President of the association of judges “Iustitia” said, in his opinion only about 3-4 percent of all judges supported the legislative changes.⁵⁾Małgorzata Kryszkiewicz, “Mentalność służebną mieli sędziowie w czasach PRL”, Dziennik Gazeta Prawna 8 February 2018 at 6. In the end only 18 judges out of some 10 thousand judges in Poland agreed to be candidates, and newspapers quickly discovered that a large majority of them are judges “delegated” to the Ministry (hence subordinate to the Minister of Justice) and also newly appointed presidents of courts, nominated by Minister Ziobro (hence, his beneficiaries). To make things worse, contrary to the constitutional requirement of KRS representing courts of all levels, on the list of 18 candidates there were no judges representing the Supreme Court or the Supreme Administrative Court and no judge from a court of appeal or a military court.

The whole process of generating the candidates was shrouded in secrecy, and the names of supporters were never publicly announced, which confirms the degree of embarrassment and shame that the candidates (and their supporters) were aware of. In this way, one of the main official rationales for the changes, namely to make the appointment more democratic, has been blatantly discarded. What is worse, by making secret the lists of those who supported and seconded the candidates, it became impossible for anyone to verify whether each of the candidates indeed had a required number of supporting judges, eligible to do so. There is no way of checking these documents. A few days ago, in response to one of the NGOs applying to the Ministry of Justice, in the Freedom of Information procedure, for access to the names of judges supporting the candidates to KRS, the NGO received some sixty pages of documents with all the names of supporting judges blanked out!

15 judicial members of the KRS were elected on 7 March 2018, and reflecting the list of candidates, a large majority of the judges elected (about eighty percent) are either direct beneficiaries or recent subordinates of Minister Ziobro. The composition is badly skewed toward the lower ranks of courts. In addition to PiS, only a satellite party of PiS (named after its founder, Kukiz-15) decided to propose its candidates (PiS proposed 9 and Kukiz 6 candidates, in an act of clear collusion aimed at avoiding any “surprises” in the election) with all other opposition parties boycotting the election. Thanks to the boycott, no second round of elections was necessary, and all 15 were elected with super-majority. On the day of the election of new KRS, the incumbent *ex officio* President of KRS, Chief Justice of SC Małgorzata Gersdorf resigned from her function in the KRS.

Convening the Council means it is the Council

Which brings us back to the recent decision of Chief Justice. One of her statutory obligations, qua Chief Justice, under the new statute, is to convene the first meeting of the Council. In providing now an argument for why she decided to do so, she said that her position as Chief Justice does not leave her any room for “an act of civil disobedience”, which would be constituted apparently by non-convening of the Council. She added that her action would be futile anyway because PiS, with its full control over the parliament, would quickly find and enact an alternative way of convening the meeting. (In fact, they already flagged such alternative measures, for instance by entrusting either the President of the Constitutional Tribunal or the oldest judicial member of the new KRS with the task of convening the meeting).

None of the arguments is compelling. As to the alleged “civil disobedience” which does not fit the office of Chief Justice, the problem with this argument is that the alternative before Professor Gersdorf was not between a law-abiding and an illegal action. It is true that under the statute on KRS Chief Justice has an unconditional duty to convene KRS. But convening KRS signifies that it really *is* a KRS: something we do not know unless we find out about the names of all the supporters of the judges-members of the new KRS, and are satisfied that they all indeed are judges entitled to express such support. Since they become anonymized in documents made available to the general public, all we have is the word of the Minister of Justice Zbigniew Ziobro and the Speaker of Sejm, Mr Marek Kuchciński. But for some of us, their credibility is close to zero. So it is at least arguable that the “election” of judicial members of the KRS was in violation of the statute – and until we all find out the names of the supporters, the presumption is that such a violation may have taken place. This presumption may be rebutted only by full disclosure of all these names.

Further, and more importantly, the statute on KRS is unconstitutional in many regards: both by unconstitutionally (as shown above) giving the parliament full power of electing the judicial members of the KRS, and by a statutory extinguishment of the constitutionally guaranteed terms of office of incumbent members of KRS. Hence, by convening the KRS, Chief Justice will necessarily gloss over, hence legitimize, these unconstitutionality.

A tragic choice

Her choice has been therefore truly tragic, in the classical sense of tragedy where any option is bad. But some options are worse than others. Faced with an alternative of violating a statute and violating (by implication) a statute and the Constitution, the Chief Justice could (and, in my view, should) have chosen a lesser evil: to breach a statute which violated the Constitution in the first place.

As to the argument from futility (namely, that there will be always someone else who would be more than happy to oblige and convene the meeting, should PiS so decide) – this is perfectly correct, but with one proviso. That “someone else” would not have benefited from the moral capital which Professor Gersdorf earned in the last years. Every authoritarian system will find some persons who will replace the honest public figures in performing the dirty work. But this is not an argument for the honest ones to do it. They should protect and defend their moral capital in difficult times even if it calls for symbolic gestures which under a purely pragmatic analysis may seem futile. Symbolism matters a great deal, and to understand “symbolic” as equivalent to “trivial” is a big mistake, especially when such grand values as the rule of law are at stake. And it is just too bad that Chief Justice wasted an opportunity of affirming this principle.

References [±]

1. ↑ [The Opinion of the CCJE Bureau of 12 October 2017 on the draft legislation on the Polish National Council of the Judiciary presented by the President of Poland \(CCJE-BU\(2017\)9Rev\)](#), para 14, p. 4, (last accessed 16 January 2018). See also the [OSCE Office for Democratic Institutions and Human Rights final opinion](#) on draft amendments to the act on the national council of the judiciary and certain other acts of Poland, No JUD-POL/305/2017-Final, Warsaw, 5 May 2017, (last accessed 16 January 2016).

2. ↑ Report of the Judicial Appointments and the Report on the Independence of the Judicial System, quoted in the [opinion on the draft act amending the act on the national council of the judiciary, on the draft act amending the act on the Supreme Court, proposed by the president of Poland, and on the act on the organisation of ordinary courts](#) No. 904/2017, adopted by the Venice Commission at its 113th Plenary Session (8-9 December 2017), para 17, p. 6, (last accessed 16 January 2016).

3. ↑ Opinion 904/2017 para 22.

4. ↑ Opinion 904/2017 para 31. See also the European Commission recommendation of 20 December 2017 regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, Brussels, 20 December 2017, C(2017) 9050 final.

5. ↑ Małgorzata Kryszkiewicz, “Mentalność służebną mieli sędziowie w czasach PRL”, *Dziennik Gazeta Prawna* 8 February 2018 at 6.

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